No. 7307.

In the

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Stanley S. Anderson,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

PETITIONER'S OPENING BRIEF.

Louis W. Myers,
Joseph D. Peeler,
Ward Loveless,
Title Ins. Bldg., 433 S. Spring St., Los Angeles,
Solicitors for Petitioner.

Filed
FEB 16 1934
PAUL P. O'BRIEN,
CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Statement of the Case 3

Questions Involved and How Raised 3

Statement of Facts 6

The board's conclusions and the assignments of error 16

Brief of the Argument 19

I.

In California a husband and wife may, by agreement, transmute their community property into separate property of either one or both of the spouses 22

II.

Such agreement is not required to be in writing or to be proved by written evidence. It is valid and effective though made orally and with the utmost informality. It may be proved in parol, either by direct or circumstantial evidence 26

III.

Such agreement may be made to operate in praesenti and/or prospectively in application to future earnings, income and acquisitions, of either or both of the spouses 26

IV.

In California a contract in writing, signed by one party and accepted by the other is as effective as if signed by both 36

PAGE

V.

In the Federal courts a presumption of law is not evidence and has no probative force. It merely points out the party who has the duty of going forward, and is dissipated by positive evidence to the contrary 38

VI.

The board misconstrued and misapplied the decisions upon which it relied herein 43

VII.

The $3200.00 invested by petitioner's wife in the Beverly Hills lots did not lose its identity through being commingled with other investments 48

VIII.

Petitioner is entitled to judgment on the findings of fact 49

INDEX TO APPENDIX.

PAGE

Assignments of Error 55

TABLE OF AUTHORITIES CITED.

Cases.

PAGE

Ariasi v. Orient Ins. Co., 50 F. 548 .... 39, 41

Belcher v. Lucas, 39 F. 74 .... 5, 45
H. A. Belcher, 11 B. T. A. 1294 45
Blair v. Roth, 22 F. 932 .... 5, 18, 45
Bonwit Teller & Co. v. Commissioner, 53 F. 381 42
10 B. T. A. 723 24
28 B. T. A. 179 4

Commissioner v. Molter, 60 F. 498 32

C. R. Davis, 20 B. T. A. 931 34
Dempster Mill Mfg. Co. v. Burnet, Commissioner, 46 F. 604 41

Earl v. Commissioner, 10 B. T. A. 723, 30 F. 898, 281 U. S. 111 .... 5, 22, 44, 45
Estate of Patterson, 46 Cal. App. 415 .... 30, 32

Fidelity etc. Co. v. Fresno etc. Co., 161 Cal. 466 37
Francis Krull, 10 B. T. A. 1096 34
Frankfort etc. Co. v. California etc. Co., 28 Cal. App. 74 37

Howard C. Hickman, 27 B. T. A. 807 .... 5, 34

Kaltschmidt v. Weber, 145 Cal. 596 30
J. Kammerdiner, 25 B. T. A. 495 34
Kendrick Coal & Dock Co. v. Commissioner, 29 F. 559 51

Larson v. Larson, 15 Cal. App. 531 31
Leon Salomon, 4 B. T. A. 1109 34
Louis Gassner, 4 B. T. A. 1071 34
Lucas v. Earl, 281 U. S. 111 .... 19, 24, 25

Matern v. Commissioner, 61 F. 663 33
Moore v. Crandall, 205 F. 689 .... 30, 34

PAGE

Pedder v. Commissioner, 60 F. 866 .... 18, 45, 47
Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712 27
Planters' Operating Co. v. Commissioner, 55 F. 583 42

Rayburn v. Rayburn, 54 Cal. App. 69 32
Roberts v. Wehmeyer, 191 Cal. 601 52

Seligman v. Seligman, 85 Cal. App. 683 49
Shaw v. Bernal, 163 Cal. 262 49
Smith v. Smith, 47 Cal. App. 650 .... 31, 32

United States v. Robbins, 269 U. S. 315 4
26 U. S. C. A., Sec. 1219 40

Von Glahn v. Brennan, 81 Cal. 261 31
Washburn v. Commissioner, 51 F. 949 .... 50, 51
Wren v. Wren, 100 Cal. 276 30

Statutes.

Civil Code, Sec. 158 26
Civil Code, Sec. 159 26
Civil Code, Sec. 160 26
Civil Code, Sec. 161 27

Code of Civil Procedure, Sec. 1957 39

Text Books and Encyclopedias.

25 California Jurisprudence, 178, 179 34

No. 7307.

In the

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Stanley S. Anderson, *Petitioner,*	
vs.	
Commissioner of Internal Revenue, *Respondent.*	

PETITIONER'S OPENING BRIEF.

STATEMENT OF THE CASE.

QUESTIONS INVOLVED AND HOW RAISED.

This case comes before this Court on a petition to review a decision by the United States Board of Tax Appeals (hereinafter referred to for brevity as the "Board"), sustaining the Commissioner in the determination of income tax deficiencies against the petitioner as follows:

Year	*Deficiency*
1924	$19,036.61
1925	9,752.59

The proceedings before the Board arose under petitions filed by the petitioner for redetermination of the Commissioner's proposed deficiencies. The decision by the Board is reported at 28 B. T. A. 179.

The proposed deficiencies rested primarily upon the inclusion in the taxable net income of petitioner of certain items of income which accrued to petitioner's wife as her separate property and which were reported on separate income tax returns filed by her for the taxable years here in question.

The Commissioner contended that all of the properties which produced the income items in controversy were community property and that the income therefrom was taxable entirely to the petitioner under *United States v. Robbins,* 269 U. S. 315. This contention was sustained by the Board in its decision.

The properties which produced the income items in question, had been acquired prior to January 1, 1924, and most, but by no means all, of these properties had been acquired out of the proceeds of the joint earnings of the petitioner and his wife. All of these earnings had been reported by petitioner and his wife on joint returns in

earlier years and their taxable status is not in issue in the present proceeding.

It should be noted that this proceeding does *not* involve, to any extent, the status, for tax purposes, of any *earnings* of the petitioner or his wife from personal services during the taxable years in question. Accordingly, this case is to be distinguished from the decisions of this Court in *Blair v. Roth,* 22 F. (2d) 932; *Earl v. Commissioner,* 30 F. (2d) 898, (reversed, 281 U. S. 111); and *Belcher v. Lucas,* 39 F. (2d) 74. For like reasons, the issue in this case is materially different from that presented in the case of *Howard C. Hickman,* 27 B. T. A. 807, now pending on appeal before this Court.

It is the opinion of petitioner's counsel that a careful consideration of the uncontradicted facts will, of itself and without argument or citation of authority, lead inevitably to the conviction that the Board erred in its conclusion that the property from which the income was produced was not the separate property of the two spouses at the time of the tax periods here in question. For this reason we shall set forth the facts of the case in somewhat more detail than is customary. In the following statement of facts we are including, verbatim, *all* of the Board's findings of fact (in italics) [Tr. 30-38]. The additions thereto (in ordinary type) are from the uncontradicted testimony of credible witnesses who were in no respect impeached or otherwise discredited, and whose testimony was accepted as true by the Board.

STATEMENT OF FACTS.

The petitoner and his wife, Marguerite S. Anderson, citizens of the State of California, were married in 1914. The petitioner at that time was employed as assistant manager of the Beverly Hills Hotel, which was owned by his mother, Margaret Anderson, at a salary of $3,000 per annum. At the time of their marriage neither the petitioner nor his wife owned any property of consequence. The petitioner's employment with the hotel continued until the World War, when he went abroad.

From 1914 to 1923, inclusive, the petitioner's wife acted as a hostess for the hotel, devoting all of her time to that business. Her duties were to provide entertainment and to arrange social functions for the guests and to secure new patrons. The hotel catered to the wealthy class.

At the time of her marriage, the petitioner's wife received a gift of $5,000 from her father, J. H. Slattery. Thereafter, for five or six years, she received additional gifts from him aggregating about $20,000. This money was used for various purposes, including household expenses, and $3,200 of it was invested as appears hereinafter.

In 1916 the petitioner's wife learned that a friend of hers was interested in buying an estate in the Beverly Hills section. She and the petitioner located a desirable piece of property and negotiated the sale, receiving a commission of $10,000, which was paid to the petitioner, it being agreed between them, however, that the commission should belong one-half to each.

Before this sale was made it was definitely agreed by and between petitioner and his wife that if they should

succeed in consummating the sale, one-half of the commission to be earned thereby would belong to her as her separate property. Petitioner and his wife agreed to invest said sum of $10,000 in real property Tr. 90, 109].

In May, 1916, the petitioner and his wife purchased five vacant lots in Beverly Hills at a total cost of $13,200, which amount they paid with the $10,000 commission referred to above and $3,200 which the petitioner's wife secured from her father. The deeds to the lots were taken in the petitioner's name and so remained until May, 1932, when new deeds were made to the petitioner and his wife as tenants in common.

At the time of the purchase of these lots there was a definite understanding between petitioner, his wife and her father that she owned a one-half interest therein and that the petitioner owned the other half. [Tr. 91, 92, 108] "She was to have half as her separate property." [Tr. 109] She did not know at that time nor at any time until the last of May, 1932, that the title to these lots was taken in the name of petitioner alone. [Tr. 92, 109]. She then learned for the first time that the title was in the sole name of petitioner and immediately employed an attorney and required petitioner to convey a half interest in the lots to her, and to execute a contract in writing reciting that she was the owner, as her separate property, of a one-half interest in these lots as well as other properties hereinafter referred to. [Tr. 100, 101, 111, 112, 418-429].

While the petitioner was overseas and prior to his return in 1919 the petitioner's wife and his mother entered into an oral agreement whereby she, the petitioner's wife, and the petitioner, upon his return, were to take over the entire management of the hotel and were to receive a

stipulated yearly salary of $3,000 plus one-half of the net profits. As a consideration for this agreement the petitioner's wife was to render full time services to the hotel. It was specifically agreed that she would share equally with the petitioner the yearly salary and the profits, if any. The agreement between petitioner and his wife was that she was to have one-half of the salary and net profits as her separate property. [Tr. 93, 110]. *Under this contract the petitioner and his wife received profits over the period 1919 to 1923, inclusive, of approximately $140,000. This amount, together with the salary of $3,000 per year, was paid to the petitioner by checks drawn on the hotel by himself as manager and was deposited by him in a joint bank account for himself and wife.*

Part of this money was used in making improvements on the five lots previously purchased. No expenditure was made from this fund unless petitioner and his wife both agreed thereto in advance. [Tr. 93, 99, 111.] J. R. Moulthrop, Esq., of San Francisco, who was attorney for Mrs. Anderson, senior, during all of this period (and, on occasions, for the petitioner), "always understood that there was an agreement between Stanley S. Anderson and Marguerite S. Anderson as to separate compensation. * * * it was a matter of common knowledge in the family." [Tr. 86.]

In September, 1923, the petitioner, with the knowledge and consent of his wife, entered into agreements with the Janss Investment Co. and Charles H. Christie for the acquisition of certain undivided interests in two real estate subdivisions. The contracts were signed by the petitioner and deeds were made out in his name. The total investment therein of the petitioner and his wife was

approximately $56,000, which was paid, for the most part, out of the profits from the hotel. Soon after this transaction the petitioner's wife asked him to prepare a written memorandum defining his and her respective rights in the investment. Accordingly, the petitioner, on September 5, 1923, prepared and delivered to his wife the following letter:

> *"Confirming our conversation relative to the Janss Investment and Charlie Christie land deal.*
>
> *Charlie and I agree to purchase from Janss 120.5 acres for $180,750 (for one-half interest, Janss retaining one-half), payable $60,250. cash in September and October, and notes for the balance of $120,500. On this deal I today paid $5000. on the September installment. I also entered into an agreement to purchase from Charlie Christie a 1/4 interest in 107 acres, the total price of the acreage being $321,000. and our 1/4 will amount to $80,250. Under the agreement by which Charlie is buying this land from Janss he is to pay $107,000. cash and notes for $214,000. The cash payments are to be made in September and October and I to-day paid $6250, which is 1/4 of the cash payment due in September.*
>
> *I understand from you that you agree to these transactions and agree to payment of your proportion of the cash payments from any funds now held jointly by us, and that you assume liability for your proportion of future payments, such liability to attach to your separate funds as well as those held jointly by us.*
>
> *It is the belief of Janss and Charlie that with the placing of this property on the market, the notes will be paid off from sales and we will not be called upon for cash to meet same.*

Should you for any reason have occasion, in my absence or in case of any misunderstanding arising later, to secure further details relative to this, Dr. J. will give you same."

A copy of the above letter was filed at the office of the Janss Investment Co. and Charles H. Christie also was advised of its contents. Petitioner initialed the copy of this letter, which was then delivered to the Janss Investment Co. and filed in the "Christie-Anderson" file of that company. [Tr. 71.] At that time petitioner and his wife both stated to Dr. Janss "that she owned, herself, one-half of everything" they were interested in with the Janss Company. "She made that very positive," and petitioner agreed to it. The employees of the Janss Company were then instructed that it would be "absolutely necessary" to get Mrs. Anderson's signature to all transactions affecting the Anderson properties. [Tr. 72.]

In the Janss Investment Co.'s books an account was kept in the petitioner's name until January, 1929, when the business was taken over by a newly organized corporation. In the books of the new company separate accounts were set up for the petitioner and his wife, showing them owners of separate equal interests. The Janss Investment Company had no reason for continuing to carry the account in petitioner's name, except that they were "very busy" and "probably neglected" to change it. [Tr. 76.] The Janss Investment Company followed precisely the same procedure in respect of the Christie account. They learned that Mr. Christie had five or six other persons interested with him in that transaction. Notwithstanding this they continued to carry that account on their books in the name of Christie alone but they re-

quired the signature of his associates to transactions involving those properties. [Tr. 77.]

From time to time the petitioner and his wife made other investments with their joint earnings and profits, with the understanding and agreement that they were equal owners therein and that each was entitled to receive one-half of the profits and was liable for one-half of the losses.

No investment was made unless petitioner and his wife both agreed thereto in advance. If they couldn't agree they didn't make the investment. [Tr. 93, 94, 111.] She thought that the titles to all these properties were in both their names. [Tr. 92, 111.]

Petitioner consulted Mr. Moulthrop, in 1923 or 1924, as to the advisability of deeding "Peggy's share of the property to her." Moulthrop advised him not to do so at that time, as he was borrowing frequently from the bank, and "banks and finance interests rather looked askance upon people found to be putting property in their wife's name." [Tr. 87, 88.]

The petitioner's wife at all times took an active interest in the affairs of the real estate syndicate. She frequently discussed matters of policy with the managers and gave her approval to the plans for the development and sale of the property. She signed all the deeds and mortgages and other papers of that character. Edwin Janss, president of the Janss Investment Co., and Charles H. Christie both understood that Marguerite S. Anderson and the petitioner owned equal interests in their investment. In August, 1926, the Janss Investment Co. deeded back to "Stanley S. Anderson and Marguerite S. Anderson" an

undivided one-fourth interest in 37 acres of the syndicate property which had not been sold.

In February, 1924, the petitioner and his wife executed and delivered to Edwin Janss and Harold Janss a general power of attorney, which was duly recorded. On January 27, 1925, the petitioner's wife executed and delivered a similar power of attorney to the petitioner.

In the latter part of 1924 the auditor for the Beverly Hills Hotel, upon request of the hotel bookkeeper, opened up a separate set of books for the petitioner as of January 1, 1925. Near the end of 1926 the petitioner inquired if his wife's share of the earnings from the "Young's Building" were being credited to her and, being informed that they were not, had the auditor open an account entitled "Joint M. S. Anderson" in which was set up the Young's Building at a valuation of $202,788. Also, at about that time, another account was opened as of January 1, 1926, entitled "Janss Inv. Co. Joint M. S. Anderson." Also, at about that time, another account was set up for "Marguerite S. Anderson."

On June 8, 1932, the petitioner and his wife, upon the advice of her attorney, executed a memorandum agreement providing in part as follows:

> *"Whereas the parties hereto were married in 1914 and at the time of said marriage neither had any property, and shortly thereafter an agreement was made between them to the effect that all property acquired by either after the date of their marriage, whether separate or community, should be deemed to be and should constitute the property of both of them as tenants in common, each owning an undivided one-half interest therein; and*
>
> *"Whereas about this time or shortly thereafter Mrs. Anderson received from her father, as a gift to*

her, various sums of money aggregating in all approximately $20,000.00, which she turned over to Mr. Anderson when and as received to invest under said agreement; and

"Whereas Mr. Anderson used said money, together with various earnings of both of them and various property which he received by gift from his mother, and proceeds and avails of all of said property, in purchasing, owning and selling real estate and other property, and for the purpose of convenience has carried the legal title to all property so acquired in his own name, but as trustee for himself and Mrs. Anderson as tenants in common, and said property has at all times constituted and does now constitute the property of the parties hereto as tenants in common, each owning an undivided one-half interest therein; and

"Whereas the parties desire to confirm the agreement between themselves hereinbefore referred to and to reduce the same to writing and thenceforward to to have the legal title to all real property acquired by them during their said marriage, from whatever source, held in their joint names as tenants in common pursuant to said agreement:

"Now, Therefore, it is Mutually Agreed by and between the parties hereto as follows:

"1. All property whatsoever, whether separate or community, heretofore or hereafter acquired by either of the parties hereto since and during their marriage and howsoever the legal title thereto may be held, constitutes the property and is owned by them jointly as tenants in common, each owning an undivided one-half interest therein as his and her respective separate property, and none of said property, no matter how the legal title thereto may be held, is or shall be owned in any other way than as tenants in common, each

owning an undivided one-half interest therein as his and her respective separate property."

For the calendar years 1920 to 1923, inclusive, the petitioner and his wife filed joint returns which were prepared for them by the hotel auditor. The petitioner informed the auditor in 1920 that one-half of the profits from the hotel belonged to his wife separately, but the auditor advised him that it was necessary under the law and the Commissioner's regulations to report all the income in joint returns. For the years 1924 and 1925 the petitioner and his wife filed separate returns in which they each reported one-half of their entire income. The respondent in his audit of the returns for 1924 and 1925 has held the petitioner liable for taxes upon the entire amount of the income reported in both the returns. The items of income which the petitioner alleges, in his amended petition, were erroneously included in his income and which are taxable to his wife are as follows:

1924	
Interest from Notes, Mortgages and Bank Deposits	*$ 1,698.63*
Rents from real property	*9,876.18*
Profits on sales of stocks and real property	*6,768.19*
Dividends from stocks	*2,000.00*
Profit from joint ventures in real estate	*29,506.56*
Capital net gain	*16,747.00*
1925	
Interest from Notes, Mortgages and Bank Deposits	*964.78*
Rents from real property	*5,342.80*
Dividends on stocks	*4,751.83*
Profit from joint ventures in real estate	*28,541.55*
Loss from joint ventures in real estate	*2,162.89*

It is apparent from the foregoing statement of facts that all of the properties which produced the income in question during the years 1924 and 1925 were acquired from one or more of three sources, to-wit:

(1) Gifts of money to petitioner's wife from her father during the period from 1914 to 1920. [Tr. 31.]

(2) The commission of $10,000.00 earned by the joint efforts of petitioner and his wife in 1916. [Tr. 31.]

(3) The salaries and profits aggregating approximately $155,000.00 earned by petitioner and his wife in the management and operation of the hotel during the years 1919 to 1923, inclusive. [Tr. 32.]

The money gifts to petitioner's wife from her father were of course her separate property in the first instance. $3,200.00 of this money together with the $10,000.00 derived from the commission were invested in 1916 in five vacant lots in Beverly Hills [Tr. 31, 32], upon a portion of which was erected the Young's Building, valued in 1926 at more than $200,000.00. [Tr. 35.] The salaries and profits from the operation of the hotel were invested in part in the improvements upon the five lots last referred to, prior to 1924 [Tr. 98, 99], and the remainder thereof for the most part was used in the acquisition of the subdivision properties from the Janss Investment Company and Charles H. Christie in September, 1923. [Tr. 32, 33.] The income during the years 1924 and 1925 here in question was almost wholly derived from those five lots with the improvements thereon and from the Janss and Christie properties. [Tr. 38.]

The Board's Conclusions and the Assignments of Error.

The ultimate question of law to be determined upon this appeal is whether or not the several agreements between petitioner and his wife together with their acts, declarations and conduct in consummation of said agreements were legally sufficient under the law of California to transmute their properties into separate properties of the two spouses, so as to constitute them tenants in common, each owning an undivided one-half interest as his or her separate property, prior to the beginning of the year 1924.

The assignments of error herein are numerous [Tr. 58-61] and it does not seem necessary to repeat them at length herein. (They are set forth in the appendix hereto.) The substance thereof may be stated in the following manner:

The fundamental error in the Board's decision consists in its ultimate conclusion [Tr. 47] "that the income in question for the years 1924 and 1925 was community income taxable to the petitioner." That ultimate conclusion was predicated upon certain subsidiary conclusions, each of which, in our opinion, is erroneous and which may be stated as follows:

The Board erred in assuming [Tr. 40] that petitioner's case rests upon the fact that "his wife contributed equally with him to their joint earnings." That is not the case. Petitioner's case rests upon express agreements, both oral and written, between petitioner and his wife, together with

their acts and conduct in consummation thereof, and also upon admissions against interest in the presence of numerous third parties, which rendered those agreements readily susceptible of proof and enforcement.

The Board erred in assuming [Tr. 41] that the agreement between petitioner and his wife was merely "that they should each own a separate one-half interest in all of their income and property." The agreements between petitioner and his wife went much further than this. They were expressly to the effect that her one-half interest in their income and property should be her *separate* property.

The Board erred in concluding [Tr. 41] that an agreement in writing was necessary in order to change the nature of the community property, or that "written evidence of such an agreement" was indispensable to the proof thereof. Oral agreements are valid and effective to this end under the California law and no written evidence thereof is required.

The Board erred in concluding [Tr. 42] that the letter signed by petitioner, delivered to his wife and filed with the Janss Investment Company, was not effective as an agreement because "not signed by petitioner's wife." This circumstance does not at all detract from its validity and effectiveness as a contract, under the California law, or as evidence of an oral agreement.

The Board erred in concluding [Tr. 42] that the letter last referred to "has but little, if any, probative value." We shall show that it has the highest probative value.

The Board erred in assuming [Tr. 42] that "the facts in this case are hardly distinguishable from those in *Blair v. Roth*," 22 F. (2d) 932. The facts in that case are so materially different that the opinion in that case, by clear implication, supports petitioner's contentions herein.

The Board erred in assuming [Tr. 46] that the facts in the case of *Pedder v. Commissioner* (60 F. (2d) 866) are "similar to those in the instant case." The facts in that case are so dissimilar as to render that case an authority by implication in support of petitioner's contentions herein.

The Board erred in concluding [Tr. 46, 47] that a presumption of law is evidence which remains in the case to be weighed as against proved facts established by the uncontradicted testimony of credible witnesses.

The Board erred in concluding [Tr. 47] that the testimony of petitioner and his wife respecting the oral agreements theretofore entered into between them was incompetent or otherwise insufficient. We shall show that under the California law such testimony was not only competent but was wholly sufficient to that end.

The Board erred in concluding [Tr. 41] that the $3,200.00 from her separate property which petitioner's wife invested in the five lots in Beverly Hills "were commingled with their other earnings and investments so that their identity was lost."

BRIEF OF THE ARGUMENT.

The rules of law to be discussed herein may be summarized as follows:

1. *In California a husband and wife may, by agreement, transmute their community property into separate property of either one or both of the spouses.*

2. *Such agreement is not required to be in writing or to be proved by written evidence. It is valid and effective though made orally and with the utmost informality. It may be proved in parol, either by direct or circumstantial evidence.*

3. *Such agreement may be made to operate in praesenti and/or prospectively in application to future earnings, income and acquisitions of either or both of the spouses.*

The foregoing three rules are of vital and controlling importance in their application to the facts of this case. For example, prior to the earning of the $10,000.00 commission, it was expressly agreed between petitioner and his wife that half of the commission, when earned, would be *her separate property*. [Tr. 90.] It follows that when that commission was earned and received one-half thereof, or $5,000.00, *ipso facto* became and was the separate property of Mrs. Anderson. It may be conceded for the purposes of this appeal that under the rule of *Lucas v. Earl,* 281 U. S. 111, the entire commission of $10,000.00 was properly chargeable against petitioner as community income earned by the community *during the tax year 1916.* Presumably it was so charged and paid. This does not change the fact that, as soon as it had been earned and received, one-half of that sum became and was the *separate property* of Mrs. Anderson.

Likewise when petitioner and his wife agreed to invest the $10,000.00, which they then owned as tenants in common, (together with Mrs. Anderson's $3,200.00), in the Beverly Hills lots, they expressly agreed that she was to own a half interest therein *as her separate property*. [Tr. 109.] Therefore, under the foregoing rules of law, as soon as those lots were acquired the undivided one-half interest therein *ipso facto* became and was the separate property of Mrs. Anderson. This was more than seven years prior to the commencement of the tax period here in question.

Likewise when petitioner and his wife agreed to undertake the operation and management of the hotel it was expressly agreed between them that she was to have one-half of the salary and net profits *as her separate property*. [Tr. 93, 110.] It follows that as each item of such salary and profits was earned and received one-half thereof automatically became and was the *separate property* of Mrs. Anderson. *This agreement was performed* between the parties by depositing those amounts as received *in a joint account* of petitioner and his wife. [Tr. 32.]

It likewise may be conceded for the purposes of this appeal that those earnings and profits, as received, were chargeable to petitioner as community income *for the taxable year in which they were received*. Presumably they were so charged and paid. The fact remains that, immediately after they had been received, one-half thereof became and was the separate property of Mrs. Anderson. Those earnings and profits, having been received and deposited in the joint account of petitioner and his wife, were thereafter withdrawn, from time to time, and invested in improvements upon the Beverly Hills lots and

in the acquisition of other properties, including the Janss and Christie subdivisions. This also was done pursuant to the mutual agreement of the spouses and upon the express agreement that Mrs. Anderson would own a one-half interest in those properties *as her separate property.* [Tr. 72.] It should be borne in mind that all of these transactions eventuated and were consummated *long prior to the commencement of the tax period here in question.* The evidence thus indisputably identifies Mrs. Anderson as the owner of an undivided one-half interest in all of the properties which produced the taxable income *as her separate property throughout the entire tax period* here in question.

4. *In California a contract in writing signed by one party and accepted by the other is as effective as if signed by both.*

It follows that the Board erred [Tr. 42] in denying any legal or probative effect to the letter signed by Mr. Anderson and delivered to his wife setting forth their interests in the Janss and Christie properties and their agreements respecting the same. [Tr. 237.]

5. *In the federal courts a presumption of law is not evidence and has no probative force. It merely points out the party who has the duty of going forward and is dissipated by positive evidence to the contrary.*

The entire conclusion of the Board herein rests upon the erroneous assumption that it was called upon to compare the weight of the evidence, which was all upon one side, as against the assumed weight of a presumption of law, which the Board regarded as evidence, on the other side of the case. [Tr. 30.]

6. *The Board misconstrued and misapplied the federal decisions upon which it relied.*

7. *The $3,200.00 invested by petitioner's wife in the Beverly Hills lots did not lose its identity through being commingled with other investments.*

8. *Petitioner is entitled to judgment on the findings of fact.*

I.

In California a Husband and Wife May, by Agreement, Transmute Their Community Property into Separate Property of Either One or Both of the Spouses.

This is settled law in the decisions of the California courts and of this court. The substance of the California statutes and decisions upon this subject is set forth so succinctly in the opinion of this court in *Earl v. Commissioner,* 30 F. (2d) 898, 899, that we cannot do better than to quote therefrom as follows:

> "Sections 162, 163 and 164 of the Civil Code of California provide that all property owned by either spouse before marriage or thereafter acquired by gift, bequest, devise, or descent, with the rentals, issues, and profits thereof, is separate property, and all other property acquired after marriage by either spouse belongs to them as community property, but by the same law a husband and wife may enter into any engagement or transaction with the other respecting property which either might if unmarried (section 158), and they may hold property as joint tenants, tenants in common, or as community property (section 161). It is consequently the holding of the

Supreme Court of California that an agreement between a husband and wife domiciled there, without any other consideration than their mutual consent, that the future earnings of the wife should be her separate property, is valid, and such earnings do not become community property. Wren v. Wren, 100 Cal. 276, 34 P. 775, 38 Am. St. Rep. 287; Cullen v. Bisbee, 168 Cal. 695, 144 P. 968; Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272. If, as thus seems to be the settled law of the state, and which is recognized as such by the Board of Tax Appeals (Krull v. Commissioner of Internal Revenue, 10 B. T. A. 1096), a husband and wife may legally agree by contract that the future earnings of the wife shall be her separate property, and by virtue of such agreement they do not become the property of the community, there is no sufficient reason why they may not make a similar agreement with reference to the earnings of the husband, or, as here, that their joint earnings shall belong to them jointly and not otherwise."

(It follows inevitably that there is no sufficient reason why the spouses may not make a similar agreement that their joint earnings shall belong to them as tenants in common.)

This court added:

"Under the California system there is no difference between the earnings of the wife and the earnings of the husband. They are each community property (Martin v. Southern Pacific, 130 Cal. 285, 62 P. 515), and an agreement of husband and wife that her future earnings may nevertheless be her separate property differs in no way in principle from an agree-

> ment that his earnings may be the joint property of both (Estate of Harris, 169 Cal. 725, 147 P. 967)." [Or, we add, that their earnings shall be the common property of both as tenants in common.]

While that decision of this court was later reversed (*Lucas v. Earl*, 281 U. S. 111), the decision of the Supreme Court in no way detracted from the validity and correctness of the portion of the opinion of this court above quoted. The reversal was predicated solely upon the conclusion that under the terms and provisions of the federal taxing act the earnings of the spouses during the tax year shall be deemed to have vested "for a second" in the community and therefore to be chargeable against the husband as community earnings *during that tax year.* The Supreme Court conceded the validity of the contract between the spouses and its effectiveness to transmute such earnings into separate property immediately *after* such vesting in the community, "for a second."

As is apparent from the decision of the Board at 10 B. T. A. 723, the *Earl* case involved only the taxable status of the *earnings from services* during the years in question. The Commissioner there conceded that the *income from properties,* which had been purchased with the *earnings of earlier years,* was *divisible* on the separate returns of the husband and wife. This is apparent from the statement in the Board's opinion at page 724, as follows:

> "In determining the deficiencies here involved the respondent gave effect to the agreement set out in the findings of fact *in so far as the income from property was concerned, holding that one-half of the amounts received from such sources was taxable to*

> *the petitioner's wife,* but held that the entire amounts of $24,839 and $22,946.20 received in 1920 and 1921, respectively, as salary, fees, etc., were taxable to the petitioner."

(Italics added throughout, unless otherwise noted.)

In the present case, the only issue relates to the *income from property which had been acquired in earlier years,* principally out of the earnings of the petitioner and his wife, which, by express agreement, had been transmuted into separate property, owned by them as tenants in common. Accordingly, our contentions herein are similar to those which, in the Earl case, were admitted by the Commissioner and held by the Board to be correct.

Both the respondent and the Board concede herein that "the respective interests of the husband and wife in community property and likewise community income, with certain limitations as set forth in *Lucas v. Earl,* 281 U. S. 111, are subject to change by contract between the husband and wife." [Tr. 39, 40.] The Board, however, apparently assumed that such contract to be effective must have been in writing or at least must have been proved by written evidence. They say [Tr. 41]: "There is no written evidence of such an agreement with respect to any of their property prior to September 5, 1923, which is the date of the above letter from petitioner to his wife, * * *." Again they say [Tr. 42]: "The letter is not signed by petitioner's wife and was not executed as an agreement." The Board was in error in its conclusion in this respect. The law of California places no such limitation upon the right of the spouses to contract in respect of the community property or upon the character of evidence required to prove and enforce such contracts.

II.

Such Agreement Is Not Required To Be in Writing or To Be Proved by Written Evidence. It Is Valid and Effective Though Made Orally and With the Utmost Informality. It May Be Proved in Parol, Either by Direct or Circumstantial Evidence.

III.

Such Agreement May Be Made to Operate in Praesenti and/or Prospectively in Application to Future Earnings, Income and Acquisitions, of Either or Both of the Spouses.

The foregoing rules of law are firmly established by the California statutes and decisions, which in this behalf are controlling upon this court.

California Civil Code, section 158, provides in part:

> "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; * * *"

Section 159 provides in part:

> "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property * * *."

Section 160 provides:

> "The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section."

Section 161 provides:

> "A husband and wife may hold property as joint tenants, tenants in common, or as community property."

The leading California case upon this subject is *Perkins v. Sunset Tel. & Tel. Co.,* 155 Cal. 712. That was an action by a married woman to recover damages for personal injuries sustained by her as a result of the defendant's negligence. The defendant contended that under the California statutes such cause of action was community property vested in plaintiff's husband, who was not a party to the action. The trial court found:

> "For more than ten years there had been an agreement between J. F. Perkins and his wife whereby it was mutually consented that all community property on hand *or to be acquired* by either should be and become the sole and separate property of Elizabeth M. Perkins (the plaintiff)."

That agreement was established at the trial by the parol testimony of witnesses. Upon this point the Supreme Court said (155 Cal. pp. 719-721):

> "Appellant attacks these findings on the ground that the evidence is insufficient to support them, but they set forth substantially the facts deducible from the *testimony of plaintiffs* themselves and of *other witnesses.* Appellant calls attention to the fact that there is no evidence of an *assignment* by the husband of his interest in the cause of action and then cites authorities to the effect that a cause of action for tort is not assignable. Undoubtedly appellant is correct in its position that such cause of action generally cannot be assigned, but the point is not here involved. The findings are not that there was an *assignment* but

that long before the cause of action arose Mr. Perkins *relinquished* his interest in the community property and that his act, after the injury to his wife, was one *of relinquishment and not of assignment.* Respondents contend that: 1. The cause of action was the separate property of the wife when it arose; and, 2. That in any event the agreement between the two spouses was sufficient to *transmute* the community property into separate property.

"Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property whereby *one may release to the other all interest, both present and in expectancy.* (Crum v. O'Rear, 132 Ill. 443 (24 N. E. 956); *In re* Davis, 106 Cal. 453 (39 Pac. 756); Von Glahn v. Brennan, 81 Cal. 264 (22 Pac. 596); Wren v. Wren, 100 Cal. 279 (38 Am. St. Rep. 287, 34 Pac. 775); Kaltschmidt v. Weber, 145 Cal. 598 (79 Pac. 272).) In the case last cited the following language is used: 'There can be no doubt that the husband may make a gift of the community property to the wife, and that the effect of such gift will be to *transmute* it into her separate estate. The provision in section 172 of the Civil Code that he cannot make a gift of community property unless the wife, in writing, consent thereto, is a provision for her benefit and protection, and it has no application to the case of a gift by the husband directly to the wife. And so, also, he may, under sections 158 and 159 of the Civil Code, contract with her by an agreement that her personal earnings shall be her separate property, and *this may apply to future as well as past earnings,* and the effect of such an agreement will be to convert such earnings *from the status of community property to that of separate property* of the wife.' It will be seen by an examination of the authorities cited above

that the utmost freedom of contract exists in California between husband and wife and that *the courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence or non-existence of a contract* where the exact terms of the alleged agreement has escaped the memory of one or both of the parties to it. In the case at bar *there was both positive evidence and also testimony as to facts and circumstances* tending to show that the contract, whereby the husband *remitted* to his wife all his interest in that which would ordinarily have been the community property, was, and had been in existence for a long period of years. The findings upon that subject were supported by the evidence."

The foregoing decision establishes a number of points of importance in the present case, among which are the following:

1. That a husband and wife may by mutual agreement *transmute* the community property into separate property.

2. That such agreement may apply to future as well as past earnings and acquisitions.

3. That such agreement need not be in writing.

4. That it may be proved by parol testimony.

5. That it may be proved by circumstantial evidence.

6. That such an agreement does not operate by way of assignment or conveyance, but operates by establishing the *status* and *incidents* of the property.

Kaltschmidt v. Weber, 145 Cal. 596, involved the question whether the earnings of the wife while living with her husband were her separate property or community property. The court held that a prior understanding between the spouses whereby she was to have the management and control of her earnings would be adequate and effective to transmute her future earnings into separate property. Upon this point the court said:

> "And so, also, he may, under sections 158 and 159 of the Civil Code, contract with her by an agreement that her personal earnings shall be her separate property, and this may apply to future as well as past earnings, and the effect of such an agreement will be to convert such earnings from the *status* of community property to that of separate property of the wife." (The italics are the court's.)

The decision of the California court in *Wren v. Wren,* 100 Cal. 276, and the decision of this court in *Moore v. Crandall,* 205 F. 689, are to the same effect.

In *Estate of Patterson,* 46 Cal. App. 415 (petition for hearing denied by the Supreme Court), the principal question was whether an agreement between husband and wife whereby the former relinquished to the latter his inheritable interest in her estate, which consisted of real and personal property, was required to be in writing, or to be proved by written evidence, in order to be valid and effective. The court held that it was not, saying (46 Cal. App. 421):

> "Nor is such an agreement within any provision of our statute of frauds, or within the fair import of any language thereof."

The court then pointed out that under the California statutes and decisions such an agreement is valid and effective though resting solely in parol, and that it may be proved either by parol testimony or by circumstantial evidence.

It is also well settled in California that such agreements are valid and effective although couched in the most informal terms.

In *Von Glahn v. Brennan,* 81 Cal. 261, the only express agreement between the spouses was that the husband said to the wife, "Everything you make is yours." That case was an action of ejectment relating to real property between the wife and a third party. The court held that the parol testimony above quoted, together with circumstantial evidence as to the conduct of the parties, was sufficient to establish her separate ownership.

In *Larson v. Larson,* 15 Cal. App. 531, the only direct evidence of an agreement between the spouses was the testimony of the wife that her husband had said to her: "Go ahead on your own business and take care of your business for yourself." The court held that this testimony, together with circumstantial evidence of the conduct of the parties, was sufficient to establish a valid contract the effect of which was to transmute her future earnings into her separate property.

Smith v. Smith, 47 Cal. App. 650, was a controversy between the spouses as to whether certain real property which had been acquired subsequent to the marriage and paid for out of the wife's earnings, was community property or was her separate property. *There was no direct evidence of any agreement between the spouses.* The court held that the evidence of the acts and conduct of the

spouses (which was entirely circumstantial) was legally sufficient to establish the existence of a contract between them the effect of which was to transmute her earnings into her separate property.

Rayburn v. Rayburn, 54 Cal. App. 69, is to the same effect. That was a controversy between husband and wife as to whether her earnings were community property or were her separate property. There was no evidence of any express agreement between the spouses. The court said:

> "There was no direct evidence as to whether or not the parties considered the wife's earnings to be her separate property. In the absence of more certain proof, such statements and conduct of the defendant afford sufficient grounds for the *inference* that it was understood between them that the wife's earnings should be her separate property."

The rule is thus firmly established in California that parol evidence is competent and sufficient to establish the wife's separate ownership in property the legal title to which is in the husband and which is presumptively community property. This is the rule in California even though the property in question be real property. (*Smith v. Smith, supra,* 47 Cal. App. 650; *Estate of Patterson, supra,* 46 Cal. App. 415.) As the court said in the case last cited:

> "Nor is such an agreement within any provision of our statute of frauds, or even the fair import of any language thereof."

The same rule obtains in the federal courts. In *Commissioner v. Molter,* 60 F. (2d) 498, the Circuit Court of

Appeals for the Tenth Circuit held that parol evidence or circumstantial evidence is competent and sufficient to establish the fact that real property the legal title to which stood in the name of the husband was in fact owned jointly by the husband and wife. That case is on all fours with the case at bar.

Likewise in the case of *Matern v. Commissioner*, 61 F. (2d) 663, this court held that parol evidence was competent and sufficient to establish the wife's separate ownership of real property the legal title to which stood in the husband.

In the present case there are two separate and distinct reasons (each of which alone is wholly sufficient) why neither a written agreement nor written evidence was required to establish the wife's separate ownership in one-half of the properties here in question. These are:

1. In California an agreement between the spouses changing the marital property from community to separate, or vice versa, *does not operate as a conveyance or transfer.* As is shown by the California decisions above cited, such an agreement operates directly and of its own force to *change the nature and incidents* of the property *without changing the legal title.* Accordingly, as pointed out by the California court, there is no statute of frauds applicable thereto.

2. In the present case the community earnings were effectively transmuted into separate property of the spouses *before they were invested in any real property.* Therefore, when real properties were thereafter purchased with those funds, one-half of the purchase price thereof *was paid with the wife's money.* Under these circum-

stances, when the legal title to the real properties was taken in the name of the husband, a resulting trust arose *ipso facto* whereby the husband held such legal title as trustee for his wife to the extent of an undivided one-half interest. The existence of such a resulting trust may always be proved by parol evidence.

25 *Cal. Jur.* 178, 179, and cases cited.

As a matter of fact the Board's decision in this case is absolutely inconsistent with its own decisions recognizing that agreements between husband and wife transmuting community property into separate property need not be evidenced by written documents, but may be proved by oral testimony and other circumstances. Thus, in *Francis Krull,* 10 B. T. A. 1096, the Board gave effect to an *oral* agreement between a husband and wife transmuting the earnings of a wife into her separate property. To the same effect, see

Louis Gassner, 4 B. T. A. 1071;
C. R. Davis, 20 B. T. A. 931;
Leon Salomon, 4 B. T. A. 1109 (citing *Moore v. Crandall,* 205 F. 689, C. C. A. 9th); and
Howard C. Hickman, 27 B. T. A. 807.

In the present case, the practical effect was a *quasi* partnership between the petitioner and his wife, in which they pooled all their properties and earnings and in which each was to own a separate one-half interest. So viewed, this case is an exact parallel of *J. Kammerdiner,* 25 B. T. A. 495, 497, in which decision the Commissioner has announced acquiescence (C. B., XII-1, page 7), where the Board said:

"Section 158 of the Civil Code of California provides that "a husband and wife may enter into a part-

nership in California, and if there is an agreement which shows that the intention of the parties is to create a vested interest in the partnership in the wife as her separate property, such intention will change the character of their property from community to separate property.' In this proceeding it is perfectly clear that the petitioner and his wife joined together in April of 1923 to carry on a business enterprise for their mutual benefit. This is sufficient to establish a partnership. Cf. *Meehan v. Valentine*, 145 U. S. 611; *E. C. Wilson et al.*, 11 B. T. A. 963.

"A common law contract of partnership may be oral. *E. C. Wilson, supra; Bates v. Hancock*, 95 Cal. 479, 30 Pac. 605; *Koyer v. Willmon*, 150 Cal. 785, 90 Pac. 135; *Musick Consolidated Oil Co. v. Chandler*, 158 Cal. 7, 109 Pac. 613. The fact that for business reasons the operations were conducted in the name of the husband does not defeat the partnership. Cf. *John T. Newell*, 17 B. T. A. 93; *Leonard M. Gunderson*, 23 B. T. A. 5. Nor is it material that no capital account was maintained on the books kept by the partnership. *R. A. Bartley*, 4 B. T. A. 874; *John T. Newell, supra; E. L. Kier*, 15 B. T. A. 1114. In the light of the evidence and of the many decided cases and proceedings involving this issue, we are of the opinion that the determination of the respondent that there was no partnership in the taxable year between petitioner and his wife must be reversed. *L. S. Cobb*, 9 B. T. A. 547; *E. L. Kier, supra*."

Accordingly, the Board's decision in this case is not only contrary to the established law in California and in the federal courts, but is absolutely inconsistent with its own decisions in numerous cases involving oral agreements between spouses.

IV.

In California a Contract in Writing, Signed by One Party and Accepted by the Other Is as Effective as if Signed by Both.

As shown above, it is not necessary that an agreement between husband and wife be in written form in order to transmute community holdings or earnings into separately owned properties. It is settled law in California that a mere oral agreement, however informal, is valid, effective and adequate to change the status of the marital property without the interposition of any transfer or conveyance.

However, it should be noted that in the present case the petitioner introduced into evidence a written document clearly setting forth his wife's separate property interest in the Janss and Christie properties. Incidentally, the income from these particular properties, $29,506.56 in 1924 and $28,541.55 in 1925 [Tr. 38], represented the major part of the amounts here in controversy.

It will be remembered that on September 5, 1923, at the time of the acquisition of the Janss and Christie properties, petitioner signed and delivered to his wife a writing in the form of a letter outlining the terms of these transactions and acknowledging her interest therein and setting forth her obligations in respect thereof. [Tr. 237.] Petitioner and his wife then delivered a copy of this letter, initialed by petitioner, to Janss Investment Company and caused the same to be deposited in the files of that company as evidence of Mrs. Anderson's ownership of a one-half interest in those properties. [Tr. 69-72.] The Board

refused to accord any materiality to this document for two reasons. They said [Tr. 42]: "The letter is not signed by the petitioner's wife and was not executed as an agreement. We think that it has but little, if any, probative value." It is submitted that the Board was in error as to both conclusions.

The California Supreme Court in *Fidelity etc. Co. v. Fresno etc. Co.,* 161 Cal. 466, 473, said:

> "The receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper. (9 Cyc. 260, 391; Civ. Code, Sec. 1589; Watkins v. Rymill, L. R., 10 Q. B. D. 178, 188.)"

The case of *Frankfort etc. Co. v. California etc. Co.,* 28 Cal. App. 74, 82, is to the same effect.

It is respectfully submitted that notwithstanding the declaration of the Board, the letter in question has probative value of almost the highest character known to the law. It is a declaration against interest, an admission deliberately made by the husband, in writing, and signed by him and delivered to her, for the purpose of providing her with tangible evidence of her ownership in the properties therein referred to and defining her obligations in respect thereof. True, it does not define her interest in precise terms as being an undivided one-half interest, nor does it state expressly that her said interest is her separate popperty. Both of these omissions, however, were supplied by the contemporaneous oral declarations of both parties in the presence of Dr. Janss. [Tr. 69-72.] This letter

alone, coupled with the declarations of the parties at the time of its delivery to Dr. Janss, has a much higher probative value than any of the evidence which was held sufficient to establish the wife's separate ownership of marital property in the California cases above cited.

It is submitted that even if there were no other evidence in the case than the letter of September 5, 1923, and the testimony of Dr. Janss [Tr. 69-72] as to the circumstances of the delivery to him of an initialed copy thereof, this evidence alone would compel the reversal of the Board's decision herein.

V.

In the Federal Courts a Presumption of Law Is Not Evidence and Has No Probative Force. It Merely Points Out the Party Who Has the Duty of Going Forward, and Is Dissipated by Positive Evidence to the Contrary.

The consideration and determination of this case by the Board was permeated throughout and influenced by the erroneous conclusion of the Board that a presumption of law is evidence. This is demonstrated by the language of the decision. The first sentence of the official syllabus of the decision begins as follows [Tr. 30]:

> "In the absence of sufficient proof to overcome the presumption that the property acquired by the petitioner and his wife after marriage was community property under the laws of the state of California * * *."

Again the Board says [Tr. 46]:

> "* * * that the presumption of the law of the state of California in favor of community property was not overcome."

And again [Tr. 46-47]:

> "Aside from the presumption of law which, as we have said, operates in favor of the respondent's contention * * *";

and the Board concludes its opinion with the following [Tr. 47]:

> "We are therefore of the opinion that the petitioner has not overcome the presumption * * *."

It is thus apparent that the Board's decision is predicated upon the legal conclusion that a presumption of law is evidence. This rule of law does not obtain in the federal courts or in hearings before the Board of Tax Appeals. It does obtain in the state courts of California, but this is so merely because the California statute says so. (*C. C. P.*, Sec. 1957.)

Fortunately, the federal courts are not burdened with any such artificial and unworkable rule of evidence as is created by the California statutes. This is settled by the recent decision of this court in *Ariasi v. Orient Ins. Co.*, 50 F. (2d) 548. The situation in that case was that there was a presumption of law on the side of the defendant, as against the testimony of a single interested witness (the plaintiff) on the side of the plaintiff. The trial court rejected plaintiff's testimony and found in favor of the defendant upon the presumption of law. This court, after

an exhaustive and scholarly discussion of the authorities, reversed the judgment, holding that presumptions of law created by the California statutes are not controlling in the federal courts. As pointed out in the opinion, the federal courts follow the rule which prevails generally throughout the United States that

> "A presumption is not evidence of a fact, but purely a conclusion, having no probative force, and designed only to sustain the burden of proof until evidence is introduced tending to overcome it." (p. 553.)

It is also pointed out in the opinion that "the court cannot arbitrarily reject the testimony of a witness whose testimony appears credible."

The rational rule so firmly established in the federal courts, that a presumption is not evidence, is binding upon the Board of Tax Appeals in hearings before it. The federal statute provides:

> "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with *the rules of evidence applicable in courts of equity of the District of Columbia.*" (26 U. S. C. A., §1219.)

The rules of evidence applicable in courts of equity in the District of Columbia are those laid down in the decisions of the Supreme Court of the United States which

are cited in the opinion of this court in the *Ariasi* case, *supra.* This is demonstrated by the decision of the Court of Appeals of the District of Columbia in *Dempster Mill Mfg. Co. v. Burnet, Commissioner,* 46 F. (2d) 604. That was an appeal from a decision of the Board of Tax Appeals. In that case was presented the situation of the testimony of a single interested witness upon the side of the taxpayer, and a presumption of law upon the side of the Commissioner. The Board held in favor of the Commissioner, basing its decision upon the presumption of law. The Court of Appeals reversed this decision. The court held that it was reversible error for the Board to disregard the testimony of a single witness which was uncontradicted, notwithstanding he was an interested witness and his testimony which was rejected by the Board was opinion evidence (relating to value). The court said (p. 606):

> "The only witness who testified directly as to the value of the stock of the Florence Company on March 1, 1913, was C. B. Dempster, for forty years president of appellant company. It was his testimony that was rejected as being the testimony of an interested witness. We think it was error to disregard the testimony of this witness, inasmuch as it stands uncontradicted. The rules of evidence, in a hearing before the Board of Tax Appeals, are not different from those applied to civil procedure in the courts, except that the statutes and regulations *should be construed liberally in favor of the taxpayer.*"

In the case of *Bonwit Teller & Co. v. Commissioner,* 53 F. (2d) 381, 383, the Circuit Court of Appeals of the Second Circuit held that it was reversible error for the Board to reject the testimony of a single witness, who was uncontradicted, even though his testimony consisted solely of opinion evidence.

In *Planters' Operating Co. v. Commissioner,* 55 F. (2d) 583, the Circuit Court of Appeals for the Eighth Circuit held that it was reversible error for the Board to reject the testimony of three witnesses who were uncontradicted, even though their testimony related solely to matters of opinion. The court said (55 F. (2d) 584-5):

> "It is well established: * * *
>
> "(3) That it is reversible error for the Board of Tax Appeals to disregard competent relevant testimony when it is not contradicted. Chicago etc. Co. v. Blair (C. C. A.) 20 F. (2d) 10; Boggs & Buhl v. Commissioner (C. C. A.) 34 F. (2d) 859; Citrus Soap Co. v. Lucas (C. C. A.) 42 F. (2d) 372; Pittsburgh Hotels Co. v. Commissioner (C. C. A.) 43 F. (2d) 345; Dempster etc. Co. v. Burnet (App. D. C.) 46 F. (2d) 604; Conrad & Co. v. Commissioner (C. C. A.) 50 F. (2d) 576."

If, as we have shown, it is reversible error for the Board to reject the testimony of a single interested witness whose testimony relates to a matter of opinion, what shall be said of the action of the Board in the present case wherein it rejected the testimony of seven witnesses, all of whom were wholly credible, six of whom were disinterested, and whose testimony related to *matters of fact* within the personal knowledge of the witnesses?

VI.

The Board Misconstrued and Misapplied the Decisions Upon Which It Relied Herein.

The Board says in its opinion [Tr. 42] "the facts in this case are hardly distinguishable from those in Blair v. Roth", 22 F. (2d) 932. We submit, on the contrary, that the facts herein are so materially different from those in the Roth case that the decision of this court therein is by clear implication an authority in support of our contentions. In that case, the only issue was the taxable status of a *salary* of $5,303.90 earned by the wife during the year in question, no issue being raised with respect to the income from any property. This court explained the situation and its decision in the following statement on pages 933-934:

> "As exemplified in actual practice, the agreement of the appellee and his wife amounted to substantially this: They would contribute their earnings to a common fund, out of which their personal and community expenses would be paid; and of the savings, if any, and the property in which such savings were invested, they were to be the owners upon an equal footing. By the appellant it is not contended that, under the California statutes (sections 159, 160, Civ. Code; Wren v. Wren, 100 Cal. 276, 34 P. 775, 38 Am. St. Rep. 287; Kaltschmidt v. Weber, 145 Cal. 596, 179 P. 272; Smith v. Smith, 47 Cal. App. 650, 191 P. 60; Perkins v. Sunset T. & T. Co., 155 Cal. 712, 103 P. 190), a husband and wife domiciled in that state may not make valid agreements relating to either their separate or their community property, or that it would be incompetent, by appropriate agreement between them, to constitute the earnings of the wife her separate estate. In essence his contention is that, at most, the agreement here was for an assignment

> by each of the parties of one-half of his or her earnings to the other; that, at the instant they were received, the salaries were, by the law, impressed with the status of community property, and were taxable with reference to that status; and that the obligation to pay the tax so computed could not be escaped by contributing such incomes to the so-called partnership between the two members of the community, any more effectually than by contributing it to a like enterprise as between one member of the community and a third person. In this view we concur."

Likewise in the present case it may be conceded that the earnings of the petitioner and his wife were taxable entirely to him in the first instance during the years in which they were received. No such issue is presented in this case. The income here in question was derived solely from *investments* in real and personal property. Our contention is that *after* community earnings have been earned and received they may be transmuted by agreement of the spouses into separate property; that when they have been so transmuted and have been *invested* in real and personal property owned by the spouses as tenants in common, each spouse being the owner of an undivided one-half interest therein as his or her separate property, the income *thereafter* produced from such investments is the separate property of the two spouses, each being the owner of, and taxable on, one-half of such income.

Of particular interest in this connection is the fact that in *Earl v. Commissioner,* 10 B. T. A. 723 (affirmed by this court, 30 F. (2d) 898, and reversed by the Supreme Court, 281 U. S. 111) the Commissioner conceded that the income from *the properties purchased with the joint fund* was taxable to the husband and wife in equal proportions, even though he contended that the salaries, *as*

earned, were taxable entirely to the husband. (See *supra,* p. 24.) Likewise, in the present case, while the *earnings* may have been taxable in the first instance entirely to the husband, the *income from the properties* purchased therewith was, under the agreement, taxable to them in equal proportions on their separate returns.

The decision of this court in the *Roth* case and the decision of the Supreme Court in the *Earl* case were based upon the principle that the salaries, *as earned,* momentarily had the status of community property, even though they immediately thereafter became separate property under the agreements of the husband and wife. In both of these cases it was conceded by the Commissioner and assumed by the courts that the investments of the earnings should be treated, for tax purposes, as separate, and not as community, property.

The Board itself has distinguished the *Roth* case and the similar case of *H. A. Belcher,* 11 B. T. A. 1294 (affirmed by this court as *Belcher v. Lucas,* 39 F. (2d) 74) on this ground, as follows:

> "The agreements were that the earnings of both husband and wife were to be pooled and that they were to be the joint owners of the common fund. In those cases there was no partnership and the parties were working for others. The decisions were merely to the effect that the *earnings* of both husband and wife were community property and were taxed as such. *The earnings were not the result of the contract, but merely became subject to it after receipt. Charles Brown et al,* 13 B. T. A. 981, 985."

The Board also said in its opinion [Tr. 46] that the facts in *Pedder v. Commissioner,* 60 F. (2d) 866, are "similar to those in the instant case." Here likewise the Board was misled by its misinterpretation of the facts.

The petitioner in that case *claimed* that he and his wife were joint tenants in the property and in the income therefrom, but he himself admitted on cross-examination that there was no agreement between himself and his wife to that effect. As pointed out by this court in the opinion, the claimed agreement was nothing more than a secret intention in the mind of the husband which had not been disclosed even to the wife. Commenting upon this situation this court said (p. 869):

> "It is obvious from his testimony that in the event of his death his wife, who seemed to be wholly ignorant as to the nature of his transaction, would be unable to substantiate the claim that she took as a surviving joint tenant, property which he held in his own name and which was therefore presumptively community property."

The facts in the instant case are fundamentally different. Petitioner's wife contributed her separate property and her very substantial earnings to the venture, in the nature of a partnership, under an express agreement that she was to have an undivided one-half interest in the properties as her separate property. She was fully informed and consulted at all times with respect to the properties and assisted in their management. She was a very good business woman. [Tr. 75.] Upon the evidence in the instant case, Mrs. Anderson would not have had the slightest difficulty in establishing her separate property interest. She could accomplish this after Mr. Anderson's death if she survived him, or she could accomplish it during his lifetime. In fact, the latter is just what she did in 1932. As soon as she learned that the title to her one-half interest in these properties was not in her name of record, as she had supposed it to be, she

employed an attorney and compelled the petitioner to execute the requisite documents to vest such record title in her. [Tr. 100, 101, 111, 112.]

We are not concerned in the present case with an alleged "agreement" which was nothing more than undisclosed intention in the mind of one of the spouses. We have here definite and specific express agreements between the petitioner and his wife, first entered into early in 1916, when their income was very low and the income tax rate was only one per cent. Obviously, the purpose thereof was not to avoid or even to reduce taxes. Furthermore, the existence of the agreement was freely disclosed to all persons who had any connection with the several transactions. It was disclosed to Mr. Slattery, the father of petitioner's wife [Tr. 108]; to Mr. Adams, the auditor [Tr. 117]; to Mrs. M. J. Anderson, mother of the petitioner [Tr. 92, 93]; to Mr. Moulthrop, attorney for Mrs. M. J. Anderson [Tr. 86]; to Mr. Christie who was interested with them in the syndicates [Tr. 83], and to Dr. Janss and the officers and employees of the Janss Investment Company. [Tr. 69-73.]

In the *Pedder* case there was every reason for the Board and the court to conclude that the claimed "agreement" was a mere device for the avoidance of taxes. In the present case there is every reason for concluding that the agreements testified to were entered into in the highest good faith in order to vest Mrs. Anderson with an undivided one-half interest in the properties as her separate property. Such agreement was most reasonable since Mrs. Anderson, through her services and the investment of her separate property, was fully as important a factor in the production of the earnings and the acquisition of the properties as was the petitioner.

VII.

The $3200.00 Invested by Petitioner's Wife in the Beverly Hills Lots Did Not Lose Its Identity Through Being Commingled With Other Investments.

The Board say [Tr. 41]:

> "The evidence is to the effect that the petitioner's wife received approximately $20,000.00 from this source (gifts from her father) after her marriage to the petitioner. However, these funds were comingled with their other earnings and investments so that their identity was lost."

The Board's conclusion in this behalf is correct except as to the $3,200.00 which was invested by petitioner's wife in the purchase of the five Beverly Hills lots. Those lots are still owned by petitioner and his wife and the rentals therefrom formed a substantial portion of the income which is here in question. The $3,200.00 from her separate funds thus invested by Mrs. Anderson in the purchase of those lots, which are still owned by the spouses, certainly did not lose its identity thereby.

This point is not important except that it shows that the Board's decision herein is incorrect even according to the Board's theory of the law. If we should assume, as did the Board, that the agreements between the spouses were ineffective to change the status and incidents of the marital properties, it would follow inevitably that Mrs. Anderson's investment in these lots, which was her separate property to begin with, is still her separate property. The purchase price of those lots was $13,200.00 of which she contributed $3,200.00 from her separate funds. Therefore, according to the Board's theory, she would be the

owner as her separate property of an undivided 32/132 of this property, and this portion of the income therefrom would, even according to the Board's theory, be taxable to her and not to her husband. She would retain her proportionate interest in those lots, even though the improvements thereon had been made with community funds. *Shaw v. Bernal,* 163 Cal. 262, 267; *Seligman v. Seligman,* 85 Cal. App. 683, 688-9.

Of course we are not contending that this is the true situation. The uncontradicted evidence discloses that this investment was made by her pursuant to an agreement with her husband that each should be the owner of an undivided one-half interest in those lots. Under all of the authorities that agreement was legally effective, and the result thereof is that each spouse is entitled to one-half of the income from those lots and is chargeable with one-half thereof for tax purposes.

VIII.

Petitioner Is Entitled to Judgment on the Findings of Fact

The questions involved upon this appeal are solely questions of law. This court is not being asked to weigh the evidence or to determine conflicts therein. The evidence is all one way and there are no conflicts. The evidence is all in favor of the petitioner and the findings of fact (so far as they go) are likewise all in favor of the petitioner. It is the contention of the petitioner that the Board erred in its conclusions of law from the evidence and the facts found. Questions of the ultimate conclusion that may be drawn from the facts and whether there is substantial evidence to support such conclusion are ques-

tions of law for this court. (*Washburn v. Commissioner* (C. C. A. 8th) 51 F. (2d) 949.) Even a direct finding of fact, which involves the construction of a statute, presents a mixed question of law and fact and is not conclusive upon the appellate court. The Board of Tax Appeals cannot by its findings of fact take from the appellate courts their power to construe a statute and apply it to the facts. *Washburn v. Commissioner, supra.*

It is our contention that the facts found by the Board *require* the rendition of judgment in favor of the petitioner herein. The Board did not find expressly herein upon the ultimate issue of fact as to whether petitioner's wife was the owner of one-half of the properties here involved as her separate property. That issue was expressly tendered by the petition. It is alleged therein that "upon the receipt of said $10,000.00, petitioner agreed with his wife that $5,000.00 belonged to her as her separate property, * * *" [Tr. 15]; that "upon the purchase of said lots the petitioner and his wife agreed that they should own said lots and all income from or accretions thereto as tenants in common" [Tr. 16]; that "petitioner agreed with his wife that one-half of said compensation (salary and profits from the hotel) was to be treated as earned by her and should constitute her separate property" [Tr. 17]; that "in entering into the above agreements, it was expressly understood between petitioner and his wife * * * that she was to own as tenant in common and as her separate property one-half of the interests so acquired * * * (the Janss and Christie properties) and was to share equally with him in all losses and/or profits realized therefrom" [Tr. 19, 20]; that "all properties owned by petitioner and

his wife during the taxable years 1924 and 1925 belonged equally, half and half, to them as their separate property, as tenants in common." [Tr. 21.]

If findings were required which would be expressly and completely responsive to those issues, the Board's omission to find thereon was reversible error, and resort may not be had by the reviewing court to the opinion of the Board to eke out the findings of fact. *Kendrick Coal & Dock Co. v. Commissioner* (C. C. A. 8th) 29 F. (2d) 559. The Board did not find that the properties here in question were community property. It follows that the decision cannot be sustained, because it is not supported by the findings of fact. If the Board had so found, the decision would have to be reversed for the reason that such finding would be wholly contrary to the evidence and wholly contrary to the findings of probative facts. Whether the findings of fact are supported by substantial evidence is a question of law for the reviewing court. *Kendrick Coal & Dock Co. v. Commissioner, supra; Washburn v. Commissioner, supra.*

It is our contention that even though the findings of fact herein do not expressly cover all of the issues tendered, nevertheless the facts which were found by the Board are adequate to sustain a judgment in favor of the petitioner and are sufficiently complete to *compel* such judgment. The Board expressly found as a fact that the agreements had been made as alleged in the petition. Thus: "* * * it being agreed between them, however, that the commission (of $10.000.00) should belong one-half to each" [Tr. 31]; "It was specifically agreed that she would share equally with petitioner the yearly salary and the profits, if any" (from the hotel) [Tr. 32]; "From

time to time the petitioner and his wife made other investments with their joint earnings and profits, with the understanding and agreement that they were equal owners therein and that each was entitled to receive one-half of the profits and was liable for one-half of the losses." [Tr. 34.] There is absolutely nothing in the findings which is inconsistent with any of the foregoing.

The foregoing findings of fact, supported by the uncontradicted evidence, are not challenged by either party to this appeal. They are, therefore, conclusive upon the court. When read in the light of the remaining facts found by the Board they compel the conclusion that petitioner's wife was the owner of an undivided one-half interest in all of the properties which produced the income here in question. It is submitted that this conclusion entitles the petitioner to judgment herein.

It is true that the Board did not expressly find that petitioner's wife owned one-half of the properties *as her separate property*, but this omission is immaterial for the reason that such conclusion follows inevitably as a conclusion of law from the facts found. If she was the owner of an undivided one-half interest in those properties *her interest therein must have been her separate property*. It could not have been community property for the reason that under the law which then obtained in California it was the established doctrine "that during the marriage the husband was the sole and exclusive owner of all the community property and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him." *Roberts v. Wehmeyer,* 191 Cal. 601, 607. Therefore it follows inevitably from the facts found by the Board that peti-

tioner's wife was the owner as her separate property of an undivided one-half of all the properties which produced the income here in question. It is wholly immaterial for the purposes of this proceeding whether she owned such half interest as tenant in common or as joint tenant. In either event she was entitled to one-half of the income therefrom and the husband was chargeable for tax purposes with no more than one-half of such income.

It follows that whichever view may be taken of the findings (as to whether or not they adequately respond to all of the issues) in either case the decision of the Board must be reversed and judgment rendered for petitioner upon the probative facts found by the Board.

Respectfully submitted,

Louis W. Myers,
Joseph D. Peeler,
Ward Loveless,
Solicitors for Petitioner.

APPENDIX

ASSIGNMENTS OF ERROR.

The petitioner, as a basis for review, makes the following assignments of error:

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1924.

2. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1925.

3. The Board of Tax Appeals erred in its decision and determination as a fact that the properties owned by petitioner and his wife during each of the years 1924 and 1925 had the status of community property, under the laws of the State of California.

4. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that the properties owned by petitioner and his wife during each of the years 1924 and 1925 had the status of community property, under the laws of the state of California.

5. The Board of Tax Appeals erred in its decision and determination as a fact that there was no valid enforceable agreement between the petitioner and his wife that their income and property was owned by them otherwise than as community property, during the years 1924 and 1925.

6. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that there was no valid enforceable agreement between the petitioner and his wife that their income and property was owned by

them otherwise than as community property, during the years 1924 and 1925.

7. The Board of Tax Appeals erred in its decision and determination as a fact that petitioner's wife did not own, as her separate property, an undivided one-half interest in all the properties owned by the petitioner and his wife during the years 1924 and 1925.

8. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that petitioner's wife did not own, as her separate property, an undivided one-half interest in all the properties owned by the petitioner and his wife during the years 1924 and 1925.

9. The Board of Tax Appeals erred in its decision and determination as a fact that all of the income from said properties during the years 1924 and 1925 was taxable on the separate return of the petitioner.

10. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that all of the income from said properties during the years 1924 and 1925 was taxable on the separate return of the petitioner.

11. The Board of Tax Appeals erred in its decision and determination as a fact that petitioner's wife was not subject to tax on her separate return with respect to one-half of the income from said properties during the years 1924 and 1925.

12. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that petitioner's wife was not subject to tax on her separate return with respect to one-half of the income from said properties during the years 1924 and 1925.

13. The Board of Tax Appeals erred in its decision and determination as a fact that there was not an express

agreement, evidenced by an instrument in writing, between the petitioner and his wife, under which she acquired in 1923 and held during the years 1924 and 1925, as her separate property, an equal undivided interest with petitioner in the Janss Investment Co. and Charles H. Christie real estate ventures.

14. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that there was not an express agreement, evidenced by an instrument in writing, between the petitioner and his wife, under which she acquired in 1923 and held during the years 1924 and 1925, as her separate property, an equal undivided interest with petitioner in the Janss Investment Co. and Charles H. Christie real estate ventures.

15. The Board of Tax Appeals erred in its decision and determination as a fact that petitioner was taxable on his separate return with respect to all the income received by petitioner and his wife from said real estate ventures during 1924 and 1925.

16. The Board of Tax Appeals erred in its decision and determination as a conclusion of law that petitioner was taxable on his separate return with respect to all the income received by petitioner and his wife from said real estate ventures during 1924 and 1925.

17. The Board of Tax Appeals erred in its decision and determination of a deficiency of $19,036.61 for the taxable year 1924.

18. The Board of Tax Appeals erred in its decision and determination of a deficiency of $9,752.99 for the taxable year 1925.

19. The Board erred in rendering decision for the respondent.